IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 4:05-cv-00329-GKF-PJC**
	)	
TYSON FOODS, INC., *et al.*,	)	
	)	
Defendants.	)	

DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT DISMISSING COUNTS 1, 2, 3, 4, 5, 6 AND 10 DUE TO LACK OF DEFENDANT-SPECIFIC CAUSATION AND DISMISSING CLAIMS OF JOINT AND SEVERAL LIABILIY UNDER COUNTS 4, 6, AND 10 [DKT. #2069]

Defendants respectfully submit this reply on their *Motion for Partial Summary Judgment Dismissing Counts 1, 2, 3, 4, 5, 6 and 10 Due to Lack of Defendant-Specific Causation and Dismissing Claims of Joint and Several Liability Under Counts 4, 6, and 10* [DKT. # 2069] (the "Motion"). Plaintiffs have failed to provide Defendant-specific evidence on causation as required for the state tort, CERCLA, and RCRA claims alleged in the Second Amended Complaint. Further, Plaintiffs have failed to identify a valid legal basis under which their claim for joint and several liability can survive given Plaintiffs' undisputed contribution to the injuries alleged. Therefore, the Court should grant Defendants' Motion.

I. Counts 1, 2, 3, 4, 5, 6 & 10 Must be Dismissed Due to Plaintiffs' Failure to Produce Defendant-Specific Evidence of Causation

Defendants' motion is founded on the basic legal principle that Plaintiffs must provide evidence of a causal relationship between each individual Defendant's conduct and Plaintiffs' alleged injuries in order to present a fact question for a jury. Plaintiffs do not meaningfully dispute that such individualized evidence is required. Nor could they. Individualized proof is required because causation is a necessary element of any tort claim against any defendant. *See Twyman v. GHK Corp*., 93 P.3d 51, 54 n. 4 (Okla. Civ. App. 2004); *Angell v. Polaris Prod. Corp*., 280 Fed.Appx. 748, 2008 U.S. App. Lexis 12007 (10th Cir. June 4, 2008). To establish causation in a tort claim, a plaintiff must prove that each defendant's conduct was both the cause-in-fact[1] and proximate cause[2] of the alleged injury. Without this defendant-specific showing, a court has no basis to hold any particular defendant liable, as that defendant may have played no role in causing the alleged injury. *Id.* As set forth in Defendants' Motion, Plaintiffs

[1] *See Oakland Oil Co. v. Knight*, 92 Fed. Appx. 589, 598 (10th Cir. 2003); *McKellips v. St. Francis Hosp., Inc*., 741 P.2d 467, 470 (Okla. 1987); *City of St. Louis v. Benjamin Moore & Co*., 226 S.W.3d 110, 113 (Mo. 2007); PROSSER AND KEETON ON TORTS § 41 at 266, 269.

[2] *See Woolard v. JLG Indus*., 210 F.3d 1158, 1172 (10th Cir. 2000); *Dirickson v. Mings*, 910 P.2d 1015, 1018-19 (Okla. 1996); PROSSER AND KEETON ON TORTS § 42.

have failed to satisfy their burden to prove this first, and most basic, element of their case by neglecting to present evidence that each Defendant's conduct constituted a 'cause in fact' and proximate cause of Plaintiffs' alleged injuries.

As predicted in Defendants' Motion, Plaintiffs have attempted to fill this void in their case by invoking the concept of "indivisible injury," which is used to establish joint and several liability. *See* Motion at 3, n.4; Resp. at 18. But Plaintiffs' argument confuses joint and several liability with causation. Joint and several liability is a doctrine for apportioning damages among defendants whose concerted action causes an indivisible harm.[3] *Kilpatrick v. Chrysler Corp*., 920 P.2d 122, 126 (Okla. 1996). In a case involving joint and several liability, plaintiffs must still demonstrate that each defendant was a cause of the harm; once that predicate is established, however, the law may make each defendant responsible for remedying the entire injury because the harm is indivisible. *Id*. This is entirely distinct from a plaintiff's fundamental obligation to establish that each individual defendant caused the alleged harm. *See supra*, notes 1 & 2 and accompanying text. Without strict compliance with that obligation, liability (whether it be individual or joint and several) could be imposed on an innocent defendant merely because somebody else has caused an indivisible harm.

In addition, Plaintiffs further attempt to obfuscate the issue of causation by engaging in a discussion of circumstantial versus direct evidence that is wholly immaterial to Defendants' arguments. *See* Pltfs.' Resp., p. 17. The issue is not whether Plaintiffs must prove causation by circumstantial or direct evidence; it is whether Plaintiffs have come forward with any substantial evidence—circumstantial or direct—to meet their burden to prove causation with respect to each individual Defendant. As set forth in Defendants' Motion, they have not.

[3] That is, proving cause-in-fact and proximate cause is a condition precedent to establishing joint and several liability through the indivisible harm concept.

In an attempt to survive summary judgment in the absence of proof that each Defendant contributed to causing the harm alleged, Plaintiffs resort to mischaracterizing Defendants' arguments. Plaintiffs set up a "straw man" by stating that Defendants' argument requires Plaintiffs to trace and quantify the contribution from each and every application site to the alleged injury. Plaintiffs then attempt to knock down their "straw man" by selectively quoting and citing tort cases addressing indivisible harm.[4] An example of this is Plaintiffs' reliance on the unpublished and partially vacated opinion in *Herd v. Blue Tee Corp*., 2003 U.S. Dist. LEXIS 27381, at *41 (N.D. Okla. July 11, 2003), *vacated in part*, 2004 U.S. Dist. LEXIS 30673 (N.D. Okla. Jan. 13, 2004). While this case has doubtful precedential authority, it nevertheless supports Defendants' Motion. In *Herd*, the plaintiffs alleged that lead-laden dust blown from various defendants' chat piles and tailing ponds commingled in the air and contaminated a community. *Id.* at *39-40. The district court noted that "once the lead-laden dust reaches the air-stream, it is impossible to trace its precise source." *Id*. at *41. Because this commingling created an indivisible injury, the plaintiffs were not required to quantify the various defendants' relative contributions of lead-laden dust in order to allocate a specific amount of damages to each defendant. *Id*. at *41-42. Rather, the plaintiffs were allowed to pursue damages based on joint and several liability. *Id.* However, the *Herd* plaintiffs nonetheless still had to provide defendant-specific proof of causation. These plaintiffs were required to show that each defendant in fact

[4] For example, while explaining their theory of indivisible injury, Plaintiffs cite *Union Tex. Petroleum Corp. v. Jackson*, 909 P.2d 131, 149-50 (Okla. Civ. App. 1995) for the general rule "that where several persons are guilty of separate and independent acts of negligence which combine to produce directly a single injury, the courts will not attempt to apportion the damage." Plaintiffs' brief, however, overlooks the language regarding a "guilty" party and implies that under this case, they are not required to show defendant-specific evidence of causation. Regardless of the number of defendants, a plaintiff in any case will always be required to show that each defendant actually contributed to the alleged injury. Moreover, Plaintiffs have affirmatively demonstrated through the proposed Willow Brook consent decree that the alleged harm here is *not* "indivisible" and that a "reasonable basis" exists for apportioning the alleged harm. *See Burlington N. & Sante Fe Rwy. Co. v. United States*, 129 S.Ct. 1870, 1881-82 (2009).

contributed a measurable and significant[5] amount of the lead dust that reached the plaintiffs. *Id.* at 42-43. As the district court emphasized, "Plaintiffs must, at the summary judgment stage, create a genuine issue of material fact as to whether each individual defendant contributed to the alleged nuisance." *Id.* at 43. To do this, Plaintiffs must provide evidence that: (1) each defendant released a substantial amount of the contaminant at issue into the environment; and (2) each defendant's release actually made its way through the environment to play a substantial part in causing the harm. This fate-and-transport evidence cannot be excused even in cases such as *Herd*, where the sources of lead dust were limited. "The [*Herd*] Court simply reject[ed the] argument that any defendant who emitted lead-laden particles, no matter the distance from [the alleged harm] or the concentration of the particles, is subject to suit." *Id.* at 43-44.

In *Herd*, the district court concluded that the plaintiffs met their burden in large part because of the proximity between the defendants and their massive chat piles and the plaintiffs and the lack of other sources of lead-laden dust. *Id.* at 43-45. The district court made it clear that, as a factual matter, that case was "not about a single particle from a chat pile that is miles away." *Id.* at 44-45. The facts in *Herd* establishing liability stand in stark contrast to the facts in this case. In this case, Plaintiffs allege (correctly) that independent farmers, ranchers, and others use poultry litter as a fertilizer on fields randomly scattered throughout a million-acre watershed. They claim (wrongly) that this fertilizer indirectly contributes nutrients and bacteria to streams and lakes that may be miles, tens of miles, or even a hundred miles away from a field where poultry litter has been applied. As this Court saw at the preliminary injunction hearing, there may be numerous other fields, forests, or buildings between a field where poultry litter has been applied and the nearest stream. The specifics of the distances and barriers that stand between the

[5] The *Herd* Court noted the causal meaning of the word "contribute" defined as "play[ing] a significant part in bringing about an end or result." 2003 U.S. Dist. LEXIS 27381 at *43 n.27.

fields in question and the site of the alleged injuries is not known because Plaintiffs have made no effort to identify the locations of the fields where poultry litter is applied. Rather, the Court is left to guess where poultry litter has been applied, whether those locations are distant from streams, and whether those streams are distant from major tributaries and Lake Tenkiller. Moreover, as the Court knows, there are myriad other sources of nutrients and bacteria in the watershed, so when bacteria and nutrients are found in a stream, there is no inherent evidence that those nutrients or bacteria came from poultry litter and not humans, cattle, wildlife, or other sources. *See* Opinion and Order, Dkt. No. 1765 at 7 (Sept. 29, 2008). And even if Plaintiffs had attempted to show that one particular field contributed bacteria or nutrients to the alleged injury (which they did not), that would say nothing about whether each of the other eleven Defendants are responsible for litter applications that also contributed to the injury. Defendants have operations that are very different in size and location.

In order to establish defendant-specific proof of causation in this case, Plaintiffs must demonstrate that nutrients and bacteria from each individual Defendant have reached the waterways of the IRW in sufficient amounts to cause the alleged harm. Plaintiffs' indivisible harm theory only becomes relevant *if* they cross that fundamental evidentiary showing. However, rather than come forward with this required proof, Plaintiffs have based all of their evidence in this case on the aggregate alleged activities and impact of *all* Defendants. Plaintiffs have never connected a single instance of contamination of Lake Tenkiller, the Illinois River, or its tributaries to a specific Defendant, to one or more specific fields where litter was used, or to poultry farmers operating under contract with a specific Defendant. While Plaintiffs claim that nutrients from land applied poultry litter contributed to contamination of water bodies such as the Illinois River or Lake Tenkiller, they fail to provide evidence that any application event at a specific field by a specific Defendant contributed to the contamination alleged. *See* Defendants

Motion, Undisputed Facts ¶¶ 14-18; *see also*, Olsen II Dep. at pp. 46:24-47:25 (Defendants Motion, Ex. 4); Fisher II Dep. at pp. 74:17-25, 80:14-23, 82:9-17, 86:18-87:4 (Defendants Motion, Ex. 1).

Plaintiffs' failure to show actual causation is also fatal to their CERCLA and RCRA claims. Plaintiffs fault Defendants for not discussing *Tosco Corp. v. Koch Industries, Inc.*, 216 F.3d. 886, 891 (10th Cir. 2000). Defendants did not discuss the *Tosco* case because its holding is inapposite. *Tosco* and *Alcan* (upon which it relied) involved multiple defendants who stored or owned materials at one location. That is, both cases involved a single release site where multiple defendants were responsible for contributing the contaminants. *Tosco* merely stands for the proposition that plaintiffs in CERCLA cases involving multiple defendants responsible for one release site are only required to trace the response costs to the release rather than to each individual defendant's waste. *Id.* at 891-93. Unlike *Tosco*, however, the case at bar involves thousands of alleged release sites and properties owned by numerous entities and individuals who are not even parties to this litigation. A separate line of caselaw governs such a situation.

As discussed in *Thomas v. FAG Bearings Corp.*, 846 F. Supp. 1382 (W.D. Mo. 1994), CERCLA's strict liability provisions apply differently in cases with multiple defendants allegedly associated with multiple release sites than in cases with multiple defendants associated with a single release site. The *Thomas* court explained that applying strict liability to cases with multiple alleged release sites would produce absurd results by holding "liable anyone who released the same type of substance that has contaminated another site." *Thomas*, 846 F. Supp. at 1386-87. Under such a theory, "[a] party who discovers TCE groundwater contamination in Missouri could successfully sue every party who released TCE in the entire country." *Id.* Contrary to Plaintiffs' argument here, the courts have developed a framework to govern these multi-site, multi-party situations. Where there are multiple release sites and multiple parties,

once a contaminant is no longer in the immediate vicinity of a particular site, questions of causation arise and it becomes necessary to determine whether a given release was a "substantial factor" in a plaintiff's injury. *Id.* at 390. This requirement "comports with the notions of fairness that have always been present with questions of causation in our legal system." *Id.* Accordingly, "where multiple sites may be responsible for releases causing the contamination and that contamination resulted in response costs being incurred, plaintiffs must provide evidence that the contamination resulted from a release from defendants' site." *Kelly v. Kysor Industrial Corp.*, 1994 U.S. Dist. LEXIS 21194, *28-29, Case No. 5:91-CV-45 (W.D. Mich. Oct. 27, 1994); *see also New Jersey Turnpike Auth. v. PPG Indus., Inc.*, 197 F.3d 96, 105 (3d Cir. 1999) (overbroad CERCLA facility not limited to specific releases "would result in an unwarranted relaxation of the 'nexus' required" to show that each defendant caused the alleged contamination). Under *Tosco* and *Thomas*, like all CERCLA cases, Plaintiffs must show that the alleged damages were caused by a specific release. In this multi-defendant case with multiple alleged release sites, Plaintiffs must provide evidence that the contamination resulted from a specific release for each Defendant. General allegations covering "the industry" (like Plaintiffs' claims in this case) are insufficient.

Plaintiffs have also failed to provide the Defendant-specific evidence required to support their claims under RCRA. This Court has already held that RCRA requires proof of causation, a decision that has been affirmed by the Tenth Circuit. *See Oklahoma v. Tyson Foods, Inc.*, 565 F.3d 769, 782 (10th Cir. 2009). The inquiry required for a successful citizen suit under RCRA § 6972(a)(1)(A) "is whether the defendant's actions—past or present—cause an ongoing violation of RCRA." *South Rd. Assoc. v. International Bus. Mach.*, 216 F.3d 251, 254-55 (2nd Cir. 2000). Accordingly, Plaintiffs' causal evidence must tie the actions of each particular Defendant to an ongoing violation. Industry-wide allegations are, again, insufficient.

Plaintiffs' Response makes clear that their current evidence of individual causation is no different than the evidence Plaintiffs presented on their application for a preliminary injunction. Plaintiffs have not provided evidence that constituents from litter applications by each Defendant have contaminated the waters of the IRW to create a substantial and imminent risk to human health or the environment. To the extent that Plaintiffs have found bacteria and nutrients in the watershed, they have not shown that these constituents came from poultry litter as opposed to one of the myriad other sources of bacteria and nutrients in the IRW. Accordingly, Plaintiffs' RCRA claim should be dismissed.

II. Plaintiffs' Contribution of Nutrients and Bacteria to the IRW Precludes Application of Joint and Several Liability to Defendants

Defendants demonstrated in their Motion that joint and several liability does not apply here because Plaintiffs have contributed to their own alleged injury. In response, Plaintiffs argue that Defendants rely solely on comparative fault negligence cases that do not apply to the Plaintiffs' intentional tort claims.[6] Pltfs.' Resp., pp. 24-25. Defendants agree that comparative negligence—and the exception it provides to joint and several liability where a plaintiff has contributed to its own injury—does not apply to intentional torts. However, contrary to Plaintiffs' argument, Defendants' Motion is not based upon principles of comparative negligence. Rather, as Plaintiffs' Response makes clear, Plaintiffs are pursuing joint and several liability for intentional torts under a theory that the damages from those torts are "indivisible." Pltfs.' Resp., p. 23 (the "indivisible injury rationale has been repeatedly applied by Oklahoma

[6] Plaintiffs seemingly concede that they cannot prove their case under a theory of negligence and intend to pursue their claims as intentional torts. Pltfs.' Resp., p. 29. However, the language they use, i.e. "that their claims *involve* intentional torts," is equivocal and does not commit them to pursuing their claims solely under intentional tort theories. Based on this statement, the Court should limit Plaintiffs at trial to presenting their claims as intentional torts. If they cannot prove the necessary intent, then the Court should not permit them to fall back onto claims of negligent conduct.

courts in pollution cases"). Regardless of comparative fault principles, the indivisible harm theory is unavailable to a plaintiff who has contributed to the alleged "indivisible harm." *See Walters v. Prairie Oil & Gas Co.*, 204 P. 906, 908 (Okla. 1922).

Plaintiffs disregard this exception to the application of joint and several liability, which certainly applies outside of the negligence context,[7] and fail even to address the *Walters* case, which is directly on point. *Walters*, 204 P. at 908. Instead, Plaintiffs' response to Defendants' analysis rests on cases which are completely dissimilar to the case at hand. Plaintiffs cite *Boyles v. Oklahoma Natural Gas Co*, 619 P.2d 613 (Okla. 1980), for the idea that "the only exception to the joint and several liability of tortfeasors is under a negligence cause of action where a plaintiff is contributorily negligent." Pltfs.' Resp., p. 28. However, while the present case (according to Plaintiffs) involves intentional tort claims, *Boyles* is a negligence action decided under Oklahoma's comparative fault statute. Further, Plaintiffs cite to *Boyles* for the idea that "the several liability exception 'does not apply to tort litigation in which the injured party is not a negligent co-actor.'" Pltfs.' Resp., p. 28. Plaintiffs' selective quotation gives the impression *Boyles* applies to all torts. However, the full quote from *Boyles* states that "*Laubach* does not apply to tort litigation in which the injured party is not a negligent co-actor." 619 P.2d at 617. *Laubach v. Morgan*, 588 P.2d 1071 (Okla. 1978) is a comparative negligence case, decided under Oklahoma's comparative negligence statute. Therefore, it is clear that the *Boyles* court intended its statement to apply only to comparative negligence cases.

In contrast to these inapposite negligence cases, *Walters* makes clear that Oklahoma recognizes proper exceptions to joint and several liability outside of the limited exception recognized by *Boyles*. *See Walters*, 204 P. at 908. Moreover, a number of the cases upon which

[7] *Walters* involved a nuisance claim. *See* 204 P. at 907. Additionally, *Union Texas Petroleum Corp. v. Jackson*, 909 P. 2d 131 (Okla Civ. App. 1995), which also discusses the indivisible harm theory, involved a nuisance claim.

Plaintiffs rely not only address the comparative fault statute (which is not relevant here), but also involve suits where there were no contributing acts by the injured party. *See generally, Prairie Oil & Gas Co., v. Laskey*, 46 P.2d 484 (Okla. 1935); *Union Tex. Petroleum Corp.*, 909 P. 2d 131; *Boyles*, 619 P.2d at 616 (Plaintiff was "admittedly blame-free."); *Marshall v. Nelson Elec*., 766 F.Supp. 1018 (N.D. Okla. 1991); and *Sevitski v. Pugliese*, 151 B.R. 590 (N.D. Okla. 1993). Those cases have no applicability to the present matter. In sum, Plaintiffs' argument simply is not applicable to this case, where no claims based on negligence have been pled and where Plaintiffs have clearly contributed to the injuries they allege have occurred in the IRW. *See* Defendants' Statement of Undisputed Material Facts, ¶¶ 20, 21, 25–57.

Plaintiffs' final argument focuses on the allegedly "de minimis" nature of the State of Oklahoma's contribution to its own purported injury. The undisputed facts show that Plaintiffs' contribution of phosphorus, bacteria, and other substances to the waters of the IRW are substantial. Plaintiffs offer no evidence to dispute the substantial State contributions identified in Defendants' Motion. *See* Defendants' Statement of Undisputed Material Facts, ¶¶ 20, 21, 25–57. Additionally, Plaintiffs cite no authority for the proposition that the extent – de minimus or otherwise – of a plaintiff's contribution to its own injury has any effect on the applicability of the *Walters* exception to joint and several liability.

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' Motion for Partial Summary Judgment Dismissing Counts 1, 2, 3, 4, 5, 6 and 10 Due to Lack of Defendant-Specific Causation and Dismissing Claims of Joint and Several Liability under Counts 4, 6, and 10 [DKT. #2069].

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I certify that on the 19th day of June 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

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